MALAYAN BANKING BHD

v.

MOHD BAHARI MOHD JAMLI

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD NOOR AHMAD JCA
ARIFIN ZAKARIA JCA
[CIVIL APPEAL NO: W-04-10-97]
31 JULY 2003

LABOUR LAW: *Industrial Court - Jurisdiction - Threshold jurisdiction - Whether Industrial Court's threshold jurisdiction may be challenged by way of preliminary objection - Whether Industrial Court's threshold jurisdiction may only be questioned by challenging Minister's reference - Whether Minister must be joined as a party - Whether Industrial Court's jurisdiction to adjudicate labour dispute ousted by s. 56 Banking & Financial Institutions Act 1989 which bars remedy of reinstatement sought by dismissed employee who is a bankrupt - Whether Industrial Court can order compensation in lieu of reinstatement - Industrial Relations Act 1967, ss. 20(1), 30(6) - Banking & Financial Institutions Act 1989, s. 56*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Industrial Court - Threshold jurisdiction - Whether Industrial Court's threshold jurisdiction may be challenged by way of preliminary objection - Whether Industrial Court's threshold jurisdiction may only be questioned by challenging Minister's reference - Whether Minister must be joined as a party - Whether Industrial Court's jurisdiction to adjudicate dispute ousted by banking law that bars remedy of reinstatement sought by dismissed employee - Whether Industrial Court can order compensation in lieu of reinstatement - Industrial Relations Act 1967, ss. 20(1), 30(6) - Banking & Financial Institutions Act 1989, s. 56*

At the hearing of the dismissed employee's representations before the Industrial Court, the employer/bank had raised the preliminary objection that the employee's claim for reinstatement could not be countenanced by the Industrial Court. The preliminary objection was anchored in s. 56 of the Banking & Financial Institutions Act 1989 ('BFIA'), which section, it was submitted, prohibits a bank from employing a bankrupt. It was thus contended that the Industrial Court's jurisdiction to inquire into the employee's dismissal by the bank was ousted because the primary remedy under s. 20(1) of the Industrial

Relations Act 1967 ('IRA'), which is reinstatement, had ultimately become impossible as the employee was still an undischarged bankrupt. Unmoved by the bank's submissions, the chairman held, in his award ('the said award'), that, "Even assuming an award in favour of the claimant has to be made at the end of the day, 'the court shall not be restricted to the specific relief claimed', but must, in the case of representations for reinstatement under s. 20(1) IRA where reinstatement is not an appropriate remedy, order compensation *in lieu* of reinstatement". In other words, the Industrial Court would have the jurisdiction to inquire into the employee's dismissal to determine whether it was with or without just cause and excuse, notwithstanding the fact that it might not be able to reinstate the employee owing to s. 56 of the BFIA.

The instant appeal before the Court of Appeal was from the decision of the High Court dismissing the bank's application for orders of *certiorari* and of prohibition to quash the said award and to prevent the Industrial Court from proceeding to hear the matter.

Held (dismissing the appeal):
Per Abdul Hamid Mohamad JCA

[1] The bank's challenge on the threshold jurisdiction of the Industrial Court – by way of a preliminary objection – was wholly misconceived. The threshold jurisdiction of the Industrial Court may only be questioned by challenging the Minister's reference. Consequently, where a party to an industrial dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20(1) IRA were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute on the ground that the Industrial Court has no jurisdiction to make an adjudication. In other words, the threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion. On no account ought such matters to be taken or dealt with as preliminary objections. Having regard to the general scheme of the IRA, Parliament could not have intended a threshold-jurisdiction challenge before the Industrial Court by way of a preliminary objection. (*Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 SC followed.) (p 659 a-h)

[2] The fact that the Industrial Court might not be able to reinstate the employee (due to s. 56 of the BFIA) did not oust its jurisdiction to inquire into the employee's dismissal and determine whether it was with or without just cause and excuse. Ultimately, the Industrial Court has the power to order compensation *in lieu* of reinstatement. (pp 660 d-h & 661 a)

[Appellant/bank's appeal dismissed; Industrial Court to proceed with hearing of matter.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Semasa perbicaraan representasi pekerja yang dipecat dihadapan Mahkamah Perusahaan, majikan/bank telah membangkitkan satu bantahan awal bahawa tuntutan pekerja untuk pengembalian semula jawatan tidak dapat diluluskan oleh Mahakamah Perusahaan. Bantahan awal tersebut didasarkan pada s. 56 Akta Bank dan Institusi-institusi Kewangan 1989 ('ABIK'), yang mana, sebagaimana yang dihujahkan, melarang bank dari menggaji seorang yang bankrap. Pihak bank mengatakan bahawa bidangkuasa Mahkamah Perusahaan untuk menyiasat pemecatan pekerja tersingkir kerana remedi primer dibawah s. 20(1) Akta Perhubungan Perusahaan 1967 ('APP'), iaitu pengembalian semula jawatan, pada akhirnya menjadi mustahil kerana pekerja masih seorang bankrap. Namun begitu, pengerusi tidak bersetuju dengan hujahan pihak bank dan memutuskan di dalam award beliau ('award tersebut') bahawa, "Walaupun seandainya satu award yang memihakkan kepada pihak menuntut dibuat pada akhirnya, 'mahkamah tidak terhad kepada relief spesifik yang dituntut', tetapi mesti, di dalam kes representasi untuk pengembalian semula jawatan dibawah s.20(1) APP yang mana pengembalian semula jawatan merupakan remedi yang tidak wajar, perintah untuk pampasan sebagai ganti pengembalian semula jawatan". Dalam kata lain, Mahkamah Perusahaan mempunyai bidangkuasa untuk menyiasat pemecatan pekerja untuk menentukan sama ada ianya dibuat dengan sebab dan alasan yang adil ataupun sebaliknya, meskipun ia mungkin tidak dapat mengembalikan semula jawatan pekerja disebabkan oleh s. 56 ABIK.

Rayuan yang dibawa ke hadapan Mahkamah Rayuan ini adalah merupakan satu rayuan dari keputusan Mahkamah Tinggi yang menolak permohonan bank untuk perintah certiorari dan perintah larangan untuk membatalkan award tersebut dan menghalang Mahkamah Perusahaan dari meneruskan perbicaraan kes ini.

Diputuskan (menolak rayuan):
Oleh Abdul Hamid Mohamad HMR

[1] Persoalan bank terhadap nilai ambang bidangkuasa Mahkamah Perusahaan – melalui bantahan awal – merupakan satu tanggapan salah. Nilai ambang bidangkuasa Mahkamah Perusahaan hanya boleh dipersoalkan dengan mempertikaikan rujukan Menteri. Oleh yang demikian, bila mana satu pihak didalam pertikaian perusahaan ingin mempersoalkan nilai ambang bidangkuasa Mahkamah Perusahaan membuat satu penghukuman, melainkan dengan alasan terhad yang representasi-representasi dibawah s. 20(1) APP dibuat diluar masa, beliau mesti berbuat demikian dengan memohon untuk membatalkan, secara *certiorari*, rujukan Menteri dan, di dalam prosiding yang sama, memohon satu perintah larangan terhadap Mahkamah Perusahaan dari mendengar perkara tersebut atas alasan bahawa Mahkamah Perusahaan tidak mempunyai bidangkuasa untuk membuat penghukuman. Dalam kata lain, nilai ambang bidangkuasa Mahkamah Perusahaan tidak boleh dipertikaikan tanpa melibatkan Menteri dan memohon relief terhadap beliau. Bila mana tentangan tidak dibuat, Mahkamah Perusahaan hendaklah dibenarkan untuk memutuskan perkara itu sehingga kesudahannya. Tidak sekali-kali perkara seperti ini dibuat secara bantahan awal. Mengambilkira tujuan am APP, Parliamen tidak mungkin berniat yang nilai ambang bidangkuasa dipertikaikan dihadapan Mahkamah Perusahaan secara bantahan awal. (*Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777 SC diikuti.)

[2] Walaupun Mahkamah Perusahaan tidak mungkin dapat mengembalikan semula jawatan pekerja (disebabkan oleh s. 56 ABIK), namum begitu bidangkuasanya tidak tersingkir dari menyiasat pemecatan pekerja dan menentukan sama ada ianya dibuat dengan sebab dan alasan yang adil atau sebaliknya. Pada akhirnya, Mahkamah Perusahaan mempunyai kuasa untuk membuat perintah pampasan sebagai ganti perintah pengembalian semula jawatan.

Rayuan perayu/bank ditolak; Mahkamah Perusahaan dapat meneruskan pembicaraan perkara ini.]

Case(s) referred to:
Assunta Hospital v. Dr A Dutt [1980] 1 MLJ 96 ***(refd)***
Enesty Sdn Bhd v. Transport Workers Union & Anor [1986] 1 MLJ 18 SC ***(foll)***
Holiday Inn, Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(dist)***
Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(foll)***

Legislation referred to:
Banking and Financial Institutions Act 1989, s. 56
Industrial Relations Act 1967, s. 20(1), (3)

For the appellant/employer - TM Varughese; M/s TM Varughese & Co
For the respondent/employee - P Kuppusamy; M/s P Kuppusamy & Co

Reported by Gan Peng Chiang

JUDGMENT

Abdul Hamid Mohamad JCA:
On 21 May 1993 the Minister of Human Resources referred the representation made by the respondent to the Industrial Court pursuant to s. 20(3) of the Industrial Relations Act 1967 arising out of the dismissal of the respondent by the appellant on 19 November 1991. When the case came up for hearing before the Industrial Court, the court was informed that the respondent was an undischarged bankrupt and that the consent of the official assignee had not been obtained to enable the respondent to continue with the proceedings. Learned counsel for the appellant applied for the claim of the respondent to be dismissed primarily on two grounds. First, it would be inequitable to delay the hearing further to wait for the sanction of the official assignee. Secondly under s. 56 of the Banking and Financial Institutions Act 1989 ("BAFIA") the appellant was prohibited from employing a bankrupt. For that reason, learned counsel for the appellant submitted that the respondent's claim for reinstatement under s. 20 of the Industrial Relations Act 1967 cannot be entertained by the Industrial Court. The court was however of the view that it would be inequitable to dismiss the claim without affording the respondent an opportunity to present his case. The court, by an Award No. 272 of 1994 ("the first award") ordered the case to be struck out "with liberty".

On 13 July 1994 the official assignee granted the respondent the necessary sanction. Upon the application by the respondent, the Industrial Court ordered the proceeding to be restored.

But, at the outset of the hearing the learned counsel for the appellant raised a preliminary objection, again on the same ground under s. 56 of BAFIA.

The Industrial Court, by an Award No. 486 of 1994 ("the second award") held that it had jurisdiction to enquire into the dispute and to determine whether the dismissal of the respondent was without just cause or excuse and ordered that an early date be fixed for the hearing of the case. The award, *inter alia*, said:

> The intention of the IRA is to regulate the relations between the employer and the employee and its policy and object to settle trade disputes. No workman should be condemned to a dismissal without being heard simply because the Court could not grant him his specific relief prayed for under section 20(3). It is premature at this stage to decline to hear this dispute and make an Award. It is imperative the Court hears all the evidence rather than taking a short cut based on statutory interpretation.
>
> A careful perusal of s. 30 sub-ss. (1), (5) and (6) clearly expresses that the provisions s. 30 applies to matters of reference under s. 20(3).
>
> Even assuming an award in favour of the Claimant has to be made at the end of the day, "the Court shall not be restricted to the specific relief claimed, but must in the case of representations for reinstatement under section 20(1) where reinstatement is not an appropriate remedy, order compensation *in lieu* of reinstatement".

The appellant applied to the High Court for an order of *certiorari* and prohibition ie, to quash the second award and to prohibit the Industrial Court from proceeding further to hear the case. The High Court dismissed the appellant's application. The appellant appealed to this court. This court dismissed the appeal with costs.

Before the learned judge (as he then was), it was argued that since the primary remedy under s. 20(1) was reinstatement and since reinstatement was impossible in view of s. 56 of BAFIA, the jurisdiction of the Industrial Court to inquire into the dispute was ousted. The case of *Holiday Inn, Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 was cited.

The learned judge (as he then was) dismissed the argument. First, he noted that the learned counsel for the appellant conceded that if the Industrial Court had jurisdiction to inquire into the case, the court had jurisdiction to make a finding whether the respondent's dismissal was without just cause or excuse and to order compensation *in lieu* of reinstatement under certain circumstances.

Secondly, the learned judge (as he then was) distinguished the *Holiday Inn*, Kuching case on the basis that in the present case the respondent had never abandoned his claim for reinstatement.

The learned judge (as he then was) proceeded:

> In any event, we have yet to hear his evidence but for this challenge over the threshold jurisdiction of the applicant. If not been *(sic)* for this objection and the hearing proceeded it may transpire that on the evidence before the Industrial Court the applicant may be able to discharge its burden that the dismissal of the applicant was with just cause or excuse. In which event, the issue of reinstatement would not arise. Even if the decision of the Industrial Court after the hearing is that the dismissal was without just cause and excuse and by the primary remedy under section 20 of the 1967 Act, there would be a case for reinstatement but circumstances and reasons by virtue of section 56 of the 1989 Act the Industrial Court may exercise its discretion in not ordering reinstatement but instead to make an award for compensation *in lieu* of reinstatement as it is within its powers to do so under section 30(6) of the 1967 Act. However, before all these the applicant chose to challenge the threshold jurisdiction of the Industrial preventing it even from enquiring into the merit of the case.

Before us, the learned counsel for the appellant actually had nothing to add to his earlier submission in the High Court. He relied on s. 20 of the Industrial Relations Act 1967, s. 56 of BAFIA and the *Holiday Inn* Kuching case and submitted:

> It is respectfully submitted that the Industrial Court has no jurisdiction to hear the Claimant's case under section 20(3) of the Industrial Relation's Act 1967 which is specifically for reinstatement only. Reinstatement is statutarily prohibited under BAFIA. Thus his remedy ought to be in Civil Court.

Learned counsel for the respondent submitted that under the Industrial Relation's Act 1967, a dispute on jurisdiction occurs at two stages in proceedings before the Industrial Court. The first stage is at the initial stage affecting the hearing of the reference or the complaint itself when the reference is made by the Minister. The second stage is at the final stage affecting the award. He cited *Enesty Sdn. Bhd. v. Transport Workers Union & Anor* [1986] 1 MLJ 18 (SC), *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd.* [1997] 3 CLJ 777 (SC).

These two judgments of the Supreme Court are binding on this court. The law has been stated very clearly in the two cases.

In *Enesty Sdn. Bhd v. Transport Workers Union & Anor* [1986] 1 MLJ 18, at p. 21 Mohamed Azmi SCJ, delivering the judgment of the Supreme Court said:

> Under the Industrial Relations Act, 1967, a dispute on jurisdiction can occur at two stages in proceedings before the Industrial Court. The first is at the initial stage affecting the hearing of the reference or complaint itself when reference is made by the Minister under ss. 20(3), 26(1) or when a complaint is made under s. 56(1); and second is at the final stage affecting the award. In this context, it is appropriate to distinguish the two jurisdiction exercisable by the Industrial Court as jurisdiction to hear the reference, ie, jurisdiction to enter on an inquiry as opposed to jurisdiction to hear the reference on its merits which in effect is jurisdiction to make a particular order, decision or award. As stated by Lord Reid in *Anisminic Ltd. v. Foreign Compensation Commission* at p. 171, "But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity." The Federal Court had recognised this distinction in dealing with the matter in two separate appeals arising from the case of Dr. A. Dutt – in upholding the decision of the High Court to hear a reference made by the Minister. This is the "jurisdiction in the narrow and original sense" referred to by Lord Reid at p. 171 in *Anisminic*'s case, ie, narrow and original sense of the tribunal being entitled to enter into the inquiry in question."

In *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd.* [1997] 3 CLJ 777, Gopal Sri Ram (JCA) delivering the judgment of the Supreme Court further clarified the position under the heading "*Threshold and Anisminic Jurisdiction: General"*. The learned judge said, at pp. 788-789:

> At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed 'threshold jurisdiction' in recognition of a public decision-maker's inability to cross the threshold, as it were, and enter upon the inquiry in question. It is jurisdiction in the narrow sense.
>
> The latter class concerns jurisdiction in the wider sense and is generally called 'Anisminic jurisdiction', named after the landmark decision of the House of Lords in *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147, a case that was to have a profound effect upon the subject of administrative law. It refers to cases where a public decision-maker, having threshold jurisdiction 'misconducts' himself in such a fashion as to exceed his decision-making jurisdiction.

At pp. 793-794:

> The essence of his Lordship Mohd. Azmi J's decision, which was affirmed by the Federal Court and with which we express our unqualified agreement, is that the threshold jurisdiction of the Industrial Court may be only questioned by challenging the Minister's reference. It follows that a party to a dispute who wishes to contend that the Industrial Court does not have jurisdiction to enter upon the inquiry, eg because the dispute is extra-territorial in nature, must do so by seeking to quash the Minister's reference, and, in the same application ask for an order of prohibition against that court. In other words, the threshold jurisdiction of the Industrial Court cannot be challenged without joining the Minister and seeking relief against him.
>
> We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication.

And, at p. 796:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s. 20(1) were made out of time, he must do so by seeking to quash, by *certiorari*, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

Coming back to the present case. The inquiry has not even started yet. So, the challenge to jurisdiction of the Industrial Court is of the type termed as the "threshold jurisdiction". But the challenge was made by way of a preliminary objection, in the Industrial Court. There was no application to the High Court to quash the reference made by the Minister. On these two authorities alone the appeal should be dismissed.

We now come to the ground for the objection. Simply put, the ground is that since the respondent is claiming reinstatement and since reinstatement is not possible because the respondent is a bankrupt, therefore the Industrial Court has no jurisdiction to inquire into the complaint.

On this issue, we agree with the learned judge of the High Court (as he then was) that the case of *Holiday Inn*, Kuching is distinguishable from the present case. In that case the prayer for reinstatement having been abandoned, what was left was only a claim for damages. In the present case, the prayer for reinstatement still subsists, even though if successful, the Industrial Court may only award compensation. Furthermore, we would like to add that in that case the challenge was against the award after a full inquiry and in which a sum of RM49,005 was awarded in respect of backwages and compensation *in lieu* of reinstatement. So, the challenge for jurisdiction is of the second type, not the "threshold jurisdiction" type. (We would however like to make it clear that we do not in this appeal give any view whether *Holiday Inn*, Kuching was rightly decided or not).

Secondly, we also agree with the learned judge of the High Court (as he then was) in this appeal that the fact that the Industrial Court, at the end of the inquiry may not or cannot make an order of reinstatement does not out oust the Industrial Court's jurisdiction to proceed with the inquiry. The court has ample power to make an order of compensation *in lieu* of reinstatement. The primary issue for the determination of the Industrial Court is not whether reinstatement may be ordered or not but whether the respondent was dismissed without just cause or excuse. That is the primary issue that the Industrial Court has to decide and it can only decide after a full inquiry. Whatever remedy that the respondent may be entitled to will follow from that finding.

It is trite law that the Industrial Court has power to make an order of compensation *in lieu* of reinstatement: In *Assunta Hospital v. Dr. A Dutt* [1980] 1 MLJ 96, Mohamed Azmi J (as he then was) said, at p. 97:

> If the court decides he has been dismissed without just cause or reason, the court will proceed to make an "award" which under section 2 is not confined merely to reinstatement but is wide enough to cover the power to make other orders in respect of the matter referred to it.

And again, at letter 'E', right hand column:

> *In lieu* of reinstatement the Industrial Court can award compensation.

This judgment of Mohamed Azmi J (as he then was) was affirmed by the Federal Court [1981] 1 MLJ 115 and also received an "unqualified agreement" from the Supreme Court (through Gopal Sri Ram JCA) in *Kathiravelu Ganesan v. Kojasa Holdings Bhd.* [1997] 3 CLJ 777.

In the circumstances, we agreed with the judgment of the learned judge (as he then was) and dismissed the appeal with costs. We also directed the Industrial Court to proceed with the inquiry and the deposit to be paid to the respondent towards taxed costs.